Suhanna Malka bt Ramle v Sabah Forest Industries Sdn Bhd

HIGH COURT (KOTA KINABALU) — SUIT NO K24–109 OF 2007
ABDUL RAHMAN SEBLI JC
11 JANUARY 2010

Native Law and Custom — Land dispute — Customary rights over land — Defendant built access road across plaintiff's native land — Whether land held under native title transferable to non-native — Was there sale and purchase between defendant and plaintiff — Whether defendant fell under category of persons under s 3 of the Interpretation (Definition of Native) Ordinance to qualify as native

The land which formed the subject matter of the dispute was a portion of the plaintiff's land across which the defendant had built an access road to connect the defendant's timber concession area with its integrated pulp and paper mill. It was the plaintiff's case that the land which was held under native title was non-transferable to the defendant who is a non-native and that consequently the defendant's purported purchase of the land from the late Dua bin Panjang ('Dua bin Panjang') was in contravention of the Land Ordinance (Sabah Cap 68) ('the Land Ordinance'). The plaintiff contended that upon the demise of her grandfather, Dua bin Panjang, she became the registered owner of the land. The plaintiff was three years old when the Native Court made the order of succession on 16 March 1987 with her father Hj Ramle bin Dua (PW5) acting as guardian. The defendant's defence was, inter alia; (i) that there was no evidence that the defendant had executed the sale and purchase agreement and memorandum of transfer in respect of the said land; (ii) the memorandums of transfer executed by the affected landowners were never enforced, in that they were never submitted for registration at the land office; (iii) the defendant is entitled to use the said land as a dedicated public right of way; (iv) the plaintiff is guilty of laches; (v) the portion of the land had been acquired by the state government and that a new title deed is being processed by the Lands and Surveys Department.

Held, allowing the plaintiff's claim:

(1) Based on the evidence it was clear that the defendant did enter into a sale and purchase agreement with Dua bin Panjang with a view to purchasing the portion of the land for the construction of the access

road and that the land had changed hands from Dua bin Panjang to the defendant. The agreement was executed in escrow. The fact that the sale and purchase agreement was never executed by the parties did not put the plaintiff's claim outside the scope of the reliefs sought (see para 12). *Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153 referred.

(2) The defendant's reliance on the cases of *Liew Yu Fatt v Teck Guan & Co Ltd* [1966] 1 MLJ 87 and *Wong See Kui v Hong Hin Tin Mining Co* [1969] 2 MLJ 234 in support of his allegation that Dua bin Panjang had consented to the construction of the access road was misplaced, as the cases did not involve dealings in native land. The sale and purchase agreement would be illegal and unenforceable if either party was a non-native. In the present case, the defendant was not native because it did not fit into any of the category of 'persons' referred to in s 3 of the Interpretation Ordinance to qualify as a native. Since the agreement to purchase and sell the land is illegal being in contravention of s 17(1) of the Land Ordinance it is void by virtue of s 24(a) and (b) of the Contracts Act 1950 (see paras 16 & 20–21).

(3) There was uncontroverted evidence that the plaintiff through her father PW5 had written four letters to the defendant in 2005 complaining that the defendant was trespassing upon the land. However, the defendant did not respond to any of the letters. Even if the plaintiff had taken too long to assert her right, the Land Ordinance in any event does not recognise adverse possession of land. In the circumstances the defendant could not have acquired any right to use the plaintiff's land by simply having possession of the land, no matter how long. The defendant is still a trespasser through and through (see paras 24–25 & 27).

(4) The rationale for invoking the common law principle to use the said access road as a 'dedicated public right of way' was that the defendant had been using the said land for the past 22 years without interruption. However, the common law principle relied upon by the defendant has no application in the face of ss 17 and 64 of the Land Ordinance read with s 24 of the Contracts Act 1950 (see para 28).

(5) The reliance on ss 30 and 31 of the Land Ordinance is misplaced because the defendant being a private limited company does not fall within the ambit of these provisions. These two provisions are meant for the state government only. More importantly there is no evidence that the land had been acquired by the state government pursuant to s 3(5) of the Land Acquisition Ordinance (Cap 69) (see para 30).

(6) Having regard to the evidence clearly this was a case in which the court should exercise the discretion to grant the reliefs sought. The issues

raised by the plaintiff were not hypothetical issues, nor were they of no practical consequence. The plaintiff's case was based on actual and continued trespass by the defendant. The plaintiff had proved her case on the balance of probabilities (see para 33).

[Bahasa Malaysia summary

Tanah yang membentuk perkara subjek pertikaian ini adalah sebahagian tanah plaintif yang di atasnya defendan telah membina jalan masuk untuk menghubungi kawasan pembalakan defendan dengan kilang pulpa dan kertas bersepadu. Adalah kes plaintif bahawa tanah yang dipegang di bawah hak milik anak negeri tidak boleh dipindah milik kepada defendan yang bukan anak negeri dan oleh itu pembelian tanah yang dimaksudkan tersebut oleh defendan daripada arwah Dua bin Panjang ('Dua bin Panjang') adalah bertentangan dengan Ordinan Tanah (Sabah Cap 68) ('Ordinan tersebut'). Plaintif menghujah bahawa selepas kematian datuknya, Dua bin Panjang, dia menjadi pemilik berdaftar tanah tersebut. Plaintif berumur tiga tahun semasa Mahkamah Anak Negeri memberikan perintah pewarisan pada 16 Mac 1987 dengan bapanya Hj Ramle bin Dua (PW5) bertindak sebagai penjaga. Pembelaan defendan adalah, antara lain; (i) bahawa tidak ada keterangan bahawa defendan telah memeterai perjanjian jual beli dan memorandum pindah milik berkaitan dengan tanah tersebut; (ii) memorandum-memorandum pindah milik yang ditandatangani oleh pemilik-pemilik tanah yang berkenaan tidak pernah dikuatkuasakan; (iii) defendan berhak untuk menggunakan tanah tersebut sebagai hak jalan awam yang dikhususkan; (iv) plaintif bersalah atas kelewatan; (v) bahagian tanah tersebut telah diperoleh oleh kerajaan negeri dan bahawa hak milik baru sedang diproses oleh Jabatan Tanah dan Ukur.

Diputuskan, membenarkan tuntutan plaintif:

(1) Berdasarkan keterangan adalah jelas bahawa defendan tidak memasuki perjanjian jual beli dengan Dua bin Panjang dengan niat untuk membeli bahagian tanah tersebut untuk pembinaan jalan masuk dan bahawa tanah tersebut telah berpindah tangan daripada Dua bin Panjang kepada defendan. Perjanjian tersebut telah dimeterai dalam eskrow. Fakta bahawa perjanjian jual beli tersebut tidak pernah ditandatangani oleh pihak-pihak tidak menjadikan tuntutan plaintif di luar skop relief yang dipohon (lihat perenggan 12). *Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153 dirujuk.

(2) Sandaran defendan atas kes-kes *Liew Yu Fatt v Teck Guan & Co Ltd* [1966] 1 MLJ 87 dan *Wong See Kui v Hong Hin Tin Mining Co* [1969]

2 MLJ 234 dalam menyokong dakwaan bahawa Dua bin Panjang telah menyetujui pembinaan jalan masuk adalah salah tanggap, kerana kes-kes tersebut tidak melibatkan urusan dalam tanah anak negeri. Perjanjian jual beli tersebut akan menjadi salah di sisi undang-undang dan tidak boleh dilaksanakan jika salah satu pihak adalah bukan anak negeri. Di dalam kes ini, defendan bukan anak negeri kerana ia tidak terangkum dalam mana-mana kategori 'persons' yang dirujuk dalam s 3 Ordinan Pentafsiran untuk layak sebagai anak negeri. Oleh kerana perjanjian untuk membeli dan menjual tanah adalah salah di sisi undang-undang kerana bertentangan dengan s 17(1) Ordinan Tanah ia adalah batal disebabkan oleh s 24(a) dan (b) Akta Kontrak 1950 (lihat perenggan 16 & 20–21).

(3) Terdapat keterangan yang tidak dipertikaikan bahawa plaintif melalui bapanya PW5 telah menulis empat surat kepada defendan pada tahun 2005 mengadu bahawa defendan telah menceroboh masuk tanah tersebut. Walau bagaimanapun, defendan tidak menjawab mana-mana surat tersebut. Walaupun plaintif telah mengambil masa yang lama untuk menuntut haknya, Ordinan Tanah walau bagaimanapun tidak mengiktiraf pemilikan bertentangan tanah. Dalam keadaan ini, defendan tidak mungkin boleh memperoleh apa-apa hak untuk menggunakan tanah plaintif semata-mata dengan mempunyai milikan tanah, tidak kira berapa lama. Defendan masih seorang penceroboh (lihat perenggan 24–25 & 27).

(4) Rasional menimbulkan prinsip *common law* untuk menggunakan tanah jalan masuk sebagai 'dedicated public right of way' adalah kerana defendan telah menggunakan tanah tersebut selama 22 tahun yang lepas tanpa gangguan. Walau bagaimanapun, prinsip *common law* yang disandarkan oleh defendan tidak mempunyai aplikasi menurut ss 17 dan 64 Ordinan Tanah dibaca dengan s 24 Akta Kontrak 1950 (lihat perenggan 28).

(5) Sandaran ke atas ss 30 dan 31 Ordinan Tanah adalah salah tanggap kerana defendan sebagai syarikat sendirian berhad tidak terangkum dalam peruntukan-peruntukan ini. Kedua-dua peruntukan ini adalah dimaksudkan untuk kerajaan negeri semata-mata. Lebih penting lagi tidak ada keterangan bahawa tanah tersebut telah diperoleh oleh kerajaan negeri menurut s 3(5) Ordinan Pemerolehan Tanah (Cap 69) (lihat perenggan 30).

(6) Berdasarkan keterangan adalah jelas bahawa ini adalah kes di mana mahkamah harus melaksanakan bidang kuasa untuk memberikan relief yang dipohon. Isu-isu yang dibangkitkan oleh plaintif bukanlah isu-isu yang hipotetikal, dan bukan yang tidak mempunyai kesan praktikal. Kes plaintif adalah berdasarkan kepada pencerobohan sebenar dan

berterusan oleh defendan. Plaintif telah membuktikan kesnya atas imbangan kebarangkalian (lihat perenggan 33).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 655–664.

Cases referred to

Cheah Kim Tong & Anor v Taro Kaur [1989] 3 MLJ 252; [1989] 1 CLJ (Rep) 378, HC (refd)

Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd [1995] 2 MLJ 153, CA (refd)

Liew Yu Fatt v Teck Guan & Co Ltd [1966] 1 MLJ 87; [1965] 1 LNS 92, HC (distd)

Malayan Banking Bhd v Neway Development Sdn Bhd & Ors [2009] 1 LNS 280, HC (refd)

Russian Commercial and Industrial Bank v British Bank for Foreign Trade [1921] 2 AC 438, HL (refd)

Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the Estate of Loo Cheng Ghee) [1998] 4 MLJ 651; [1998] 4 CLJ 812, CA (refd)

Vine v National Dock Labour Board [1957] AC 488, HL (refd)

Wong See Kui v Hong Hin Tin Mining Co [1969] 2 MLJ 234, HC (distd)

Legislation referred to

Contracts Act 1950 s 24, 24(a), (b)
Interpretation (Definition of Native) Ordinance s 3
Land Acquisition Ordinance s 3(5)
Sabah Land Ordinance ss 4, 6(2), 17, 17(1), 64, 64(1), 30, 31

J Marimuttu (Claudia Lopez with him) (J Marimuttu & Partners) for the plaintiff.
Norbert Yapp (Jenny Liaw with him) (Jayasuriya Kah & Co) for the defendant.

Abdul Rahman Sebli JC:

THE CLAIM

[1] The plaintiff's claim, inter alia, is for the following reliefs:

(a) A declaration that any memorandum of transfer which may have been executed by Dua bin Panjang (deceased) in favour of the defendant is null and void and of no effect being in contravention of the provisions of the Sabah Land Ordinance (Cap 68).

(b) That the defendant and/or its employees, servants or agents who, without lawful authority, licence or consent continuously encroach or

A use part of the said land as an access road be ordered to cease from using the same forthwith and deliver vacant possession of the said access road land to the plaintiff.

(c) A declaration that the plaintiff be permitted to demolish, tear down and
B remove all roads, gates, buildings, structures, fixtures and fittings of the said defendant found on the said land without liability to compensate to the defendant.

(d) That the loss and damage suffered by the plaintiff from the time of the defendant's trespass and/or wrongful or unlawful encroachment of the
C said land be assessed and paid by the defendant as compensation for their trespass and/or encroachment upon the land.

THE PRINCIPLES

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[2] In *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the Estate of Loo Cheng Ghee)* [1998] 4 MLJ 651; [1998] 4 CLJ 812 it was held by the Court of Appeal that generally the court will not grant a declaratory judgment where an adequate alternative remedy is available or upon
E hypothetical issues or upon an issue of no practical consequence or where it may be premature to grant a declaration or where a plaintiff is guilty of laches or other inequitable conduct or where a 'cloaked declaration', that is to say, a declaration for collateral purpose or with an improper motive, is sought.

F **[3]** It was further held by the Court of Appeal that the court should be cautious in granting declaratory relief, citing with approval a passage in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade* [1921] 2 AC 438, at p 445 where Viscount Finlay said that the power to grant declarations should be 'exercised sparingly', 'with great care and
G jealousy', and 'with extreme caution'. Nonetheless Gopal Sri Ram JCA (as he then was) in delivering the judgment of the court noted that 'the learning that has later flowed upon the subject points to Viscount Finlay's language as merely reminding a court for the need to exercise judicially the discretion to grant a declaration' which Viscount Kilmuir LC made clear in *Vine v*
H *National Dock Labour Board* [1957] AC 488. Thus on the facts of *Sakapp Commodities* the learned judge concluded:

> It seems to me that, however 'cautiously' or 'sparingly' the discretion is to be exercised, this is a case in which the judge was right to grant a declaration ...

I

THE PLAINTIFF'S CASE

[4] The plaintiff's case is as follows. After the death of her grandfather, the late Dua bin Panjang in 1985 she became the registered owner of the land

held under NT19302489 situated at Kampong Pantai in the District of Sipitang, Sabah. The plaintiff was three years old when the Native Court made the order of succession on 16 March 1987 with her father Hj Ramle bin Dua (PW5) acting as guardian. The original title to NT19302489 produced in court is a re-issued version of the first original issued in 1938. According to Mejar (retired) Bernard Lee (PW3) who was the district officer and Assistant Collector of Land Revenue of Sipitang at the material time and whose signature appears on the endorsement of the succession order, the re-issued title is the original title and can be taken as good document. I am satisfied that the plaintiff is the registered owner of NT19302489.

[5] The land which forms the subject matter of the dispute is a portion of NT19302489 across which the defendant had built an access road approximately nine miles long to connect the defendant's timber concession area with its integrated pulp and paper mill. It is the plaintiff's case that the land which is held under native title is non transferable to the defendant who is a non-native and that consequently the defendant's purported purchase of the land from the late Dua bin Panjang is in contravention of the Land Ordinance (Sabah Cap 68) ('the Land Ordinance').

THE DEFENCE

[6] The defendant's case is premised on the following:

(a) There is no evidence that the defendant had executed the sale and purchase agreement and memorandum of transfer in respect of the said land.

(b) The memorandums of transfer executed by the affected landowners were never enforced, in that they were never submitted for registration at the land office.

(c) The defendant is entitled to use the said land as a dedicated public right of way.

(d) The plaintiff is guilty of laches.

(e) The portion of the plaintiff's land which the defendant has been using as an access road has been acquired by the state government and that a new title deed is being processed by the Lands and Surveys Department.

WAS THERE SALE AND PURCHASE

[7] At the trial the plaintiff produced the sale and purchase agreement dated 11 July 1985 (P1) and the memorandum of transfer (P2) to support her claim that the defendant had sought to purchase the access road land from her grandfather, the late Dua bin Panjang. This agreement was

witnessed by PW3. The plaintiff has also adduced evidence that Dua bin Panjang had signed the memorandum of transfer in escrow in the defendant's favour in respect of the access road land. Hj Ramle bin Dua confirmed that the signature appearing on the memorandum of transfer is that of his late father.

[8] Evidence of the sale and purchase is corroborated by the defendant's then company secretary and general manager Robert James @ Prins Robert James (PW2) who testified that due to time constraint the defendant decided that a sale and purchase agreement for the requisite portion of NT19302489 had to be entered into with the landowner without going through the normal process of land acquisition which would have taken time. This is also indirectly confirmed by PW3 who testified that he assisted in convincing the respective landowners to sell a part of their respective lands to the defendant in order that the defendant could build the access road.

[9] There is also the testimony of the defendant's own witness Ali Rahman bin Shabeli (DW4) who admitted under cross-examination that he is aware of the sale and purchase agreement signed between the defendant and the landowners for the purchase of portions of their lands for the purpose of building the access road. Further evidence of sale came from Meripa bin Bangau (PW7) who testified that the defendant bought the land for the purpose of building the access road. In re-examination PW7 testified that the district officer or the defendant did call the landowners to discuss the purchase of the respective portions of their lands.

[10] The defendant could not have prepared P1 and P2 in vain. It must have been for the purpose of purchasing the land. The fact that the consideration sum of RM2,775 stated in P1 corresponds exactly to the sum paid as 'compensation' to the landowners in the list at p 6 of encl 49 cannot be a pure coincidence. I have no doubt that this sum represented the purchase consideration for the land. Further, in his evidence under cross-examination PW2 was asked to explain what he meant when he said that the land was being acquired by the defendant and his answer was:

> When we referred to acquisition in this matter it refers to the S & P and not under the Land Acquisition Rules.

[11] Thus, although the defendant's representatives did not physically sign the sale and purchase agreement and the memorandum of transfer, it is clear that there was an agreement to sell and purchase the land. By taking possession and control of the said land after paying the 'compensation' sum of RM2,775 and proceeding to construct the access road, the defendant had

not only evinced an intention to purchase the land but had actually purchased it from the plaintiff. The evidence further shows that after constructing the access road the defendant treated the road as its own property. It regulated traffic along the road and even constructed a toll booth for collecting toll from commercial vehicles passing through the road.

[12] On the evidence I can only conclude that the defendant did enter into a sale and purchase agreement with the plaintiff's late grandfather, Dua bin Panjang with a view to purchasing that portion of NT19302489 for the construction of the access road and that the land had changed hands from the late Dua bin Panjang to the defendant. The agreement was not signed though, as it was executed in escrow. The fact that the sale and purchase agreement was never executed by the parties does not in my view put the plaintiff's claim outside the scope of the reliefs sought.

[13] In *Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153 it was strenuously argued that because Matang Sdn Bhd had not dated and signed the document, there could be no concluded contract. The Court of Appeal refused to subscribe to this view and held as follows:

> The true position is that where a contract has been signed by one party only, it can be enforced where there is evidence that the other party has elected to be bound by it … Part performance by one party, accepted by the other, is such other evidence. Delivery on 19 February was part performance.

[14] By referring to *Heller Factoring Sdn Bhd* I am by no means saying that the sale and purchase agreement was lawful. This is merely to illustrate the point that although the agreement was not executed the sale and purchase had indeed taken place. I shall deal with the question of illegality in a moment.

ESTOPPEL BY ACQUIESCENCE AND ILLEGALITY

[15] For convenience I shall deal with the issues together. The defendant's contention is that the allegation of trespass is baseless because the predecessor-in-title of the said land, the late Dua bin Panjang, had consented to the construction of the access road in 1985 and that therefore the plaintiff is estopped from disputing the defendant's right to use the access road based on the doctrine of estoppel by acquiescence. *Liew Yu Fatt v Teck Guan & Co Ltd* [1966] 1 MLJ 87; [1965] 1 LNS 92 and *Wong See Kui v Hong Hin Tin Mining Co* [1969] 2 MLJ 234 were cited in support.

[16] With due respect the defendant's reliance on *Liew Yu Fatt* and *Wong See Kui* is misplaced as, unlike the present case those cases do not involve dealings in native land. The plaintiff's pleaded case is that the purported purchase of the access road land is unlawful as it contravened the provisions of the Land Ordinance. The word 'dealing' is defined by s 4 of the Land Ordinance to mean 'any transaction of whatever nature by which land is affected'.

[17] There is no dispute that the defendant is and was at all material times a private limited company currently 97.78% owned by Ballapur Industries Ltd of India with the State Government of Sabah holding 2.22% share in the same. Section 17(1) of the Land Ordinance provides as follows:

> 17(1) Except with the written permission of the Minister all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden and no such dealings shall be valid or shall be recognized in any court of law unless they shall have been entered into and concluded before the 16th day of January, 1883, or in the terms of the next following clause.

[18] Section 64(1) of the Land Ordinance further provides:

> 64(1) This part shall apply only to lands held by natives, and no non-native may purchase any land held under this Part, unless in accordance with the terms of section 17, or acquire any interest thereon by way of charge or otherwise.

[19] Who then is a native? Section 3 of the Interpretation (Definition of Native) Ordinance ('the Interpretation Ordinance') defines a native as either:

(a) any person both of whose parents are or were members of a people indigenuous to the Colony; or

(b) any person ordinarily resident in the Colony and being and living as a member of a native community, one at least of whose parents or ancestors is or was a native within the meaning of paragraph (a) hereof;

(c) any person who is ordinarily resident in the Colony, is a member of the Suluk, Kagayan, Simonol, Sibutu or Ubian people or of a people indigenuous to the Colony of Sarawak or the State of Brunei, has lived as and been a member of the native community for a continuous period of three years preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in the Colony is not limited under any of the provisions of the Immigration Ordinance:

> Provided that if one of such person's parents is or was a member of any such people and either lives or if deceased is buried or reputed to be buried in the

Colony, then the qualifying period shall be reduced to two years.

(d) any person who is ordinarily resident in the Colony, is a member of a people indigenuous to Indonesia or the Sulu group of islands in the Phillipine Archipelago or the Federation of Malaya or the Colony of Singapore, has lived as and been a member of a native community for a continuous period of five years immediately preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in the Colony is not limited under any of the provisions of the Immigration Ordinance.

[20] The sale and purchase agreement (P1) would be illegal and unenforceable if either party was a non-native. As I said in *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors* [2009] 1 LNS 280:

> Section 17(1) of the Land Ordinance is designed to protect native lands from being transferred to non-natives. The duty of the court is to give effect to the legislature's intention by not recognising any transaction howsoever described and howsoever devised that aims to divest native interest in native lands in favour of non-natives except by way of a charge in favour of a financial institution, which is permitted by s 17(4). Section 17(1) of the Land Ordinance is worded strongly enough to convey this legislative intent.

[21] There is no dispute that the late Dua bin Panjang was a native. The defendant on the other hand is obviously not because it does fit into any of the category of 'persons' referred to in s 3 of the Interpretation Ordinance to qualify as a native. Since the agreement to purchase and sell the land is illegal being in contravention of s 17(1) of the Land Ordinance it is void by virtue of s 24(a) and (b) of the Contracts Act 1950 which reads:

> The consideration or object of an agreement is lawful, unless
>
> (a) it is forbidden by law
>
> (b) it is of such a nature that, if permitted, it would defeat any law.

[22] Whether or not the late Dua bin Panjang or the defendant or both of them knew that the agreement was illegal is irrelevant. What their intention was in entering into the agreement is likewise irrelevant. The illegality stems from the fact that the dealing is forbidden by law and as such must not be recognised by the court. It therefore makes no difference that the memorandum of transfer (P2) had not been registered with the land office as pointed out by learned counsel for the defendant.

A LACHES

[23] As for the question of laches I am not prepared, on the evidence, to say that the plaintiff had been guilty of acquiescence as alleged by the defendant. In dealing with the word 'laches' the court in *Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252; [1989] 1 CLJ (Rep) 378 explained:

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> The word 'laches' is one of the most over-worked words in legal arguments before the courts and it does not seem to have been fully appreciated for its nature. It means definitely something more than a mere delay, it means such delay amounting to acquiescence. Here the word acquiescence is not quite the same acquiescence as used in equitable estoppels, where, generally a plaintiff stands by watching a violation of his right in progress and keeping silence, but here, there is a completed violation of rights and a plaintiff has become aware of it. He either assents to it, or his delay in asserting his right has been so long as to rise to an inference of such assent. Regard must be had to the change in the defendant's position which has resulted from a plaintiff's delay in bringing an action. On the facts in the instant case, the plaintiffs had not been guilty of laches in the sense just stated, though I had a suspicion that the counsel were speaking merely of mere inordinate delay.

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[24] In the present case there is uncontroverted evidence that the plaintiff through her father PW5 had written four letters to the defendant in 2005 complaining that the defendant was trespassing upon the land. The defendant did not respond to any of the letters. When asked to explain why he took so long to take legal action against the defendant, PW5 said that he was not in a financial position to do so in all those years.

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[25] Even if the plaintiff had taken too long to assert her right, the Land Ordinance in any event does not recognise adverse possession of land. This is provided in s 6(2) which reads:

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> (2) Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the owner or any person entitled to an interest therein, and accordingly, any written law relating to the limitation of suits in force in Sabah shall in no circumstances operate to extinguish any title or interest in land.

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[26] In *Halsbury's Laws of Malaysia*, Vol 10(1) Reissue the learned authors said at para 250.187:

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> The Sabah Land Ordinance provides that it is not possible to obtain title to land by adverse possession in Sabah. Previously, the Ordinance prescribed this over State

land so that no unlawful occupation of State land or land reserved for a public purpose or residential purpose or occupied under temporary licence for however long a period would establish any right, title or interest in State land or land reserved for a public purpose or residential purpose, or create any right to demand a title to such land from the Government. The Ordinance has now been amended to the effect that no adverse possession of land would bar the right of the owner or any person entitled to an interest therein to that land.

[27] In the circumstances the defendant could not have acquired any right to use the plaintiff's land by simply having possession of the land, no matter how long. The defendant is still a trespasser through and through.

DEDICATED PUBLIC RIGHT OF WAY

[28] It was argued in the alternative that the defendant is entitled to invoke the common law principle to use the said access road as a 'dedicated public right of way'. The rationale is that the defendant has been using the said land for the past 22 years without interruption. In my view the common law principle relied upon by the defendant has no application in the face of statutory provisions, in this case ss 17 and 64 of the Land Ordinance read with s 24 of the Contracts Act 1950.

[29] In para 250.481 of *Halsbury's Laws of Malaysia*, the learned authors have this to say on the subject:

> The Contracts Act 1950 provides that nothing contained in the Act will affect any written law or any usage or custom of trade, or any incident of any contract, not inconsistent with the Act.
>
> This provision would seem to justify reference being made to other legislation which is in pari materia with the Act, and to permit the operation of general common law principles of contract where the Act does not make provision. Further, the Act can be interpreted by reference to common law principles so long as that interpretation would not achieve a solution which was contrary to the terms of the Act. The Civil Law Act 1956 should also be considered in relation to principles which are not contained in the Contracts Act 1950.

WHETHER LAND ACQUIRED

[30] The defendant's last line of defence is that the portion of land which the defendant has been using as an access road had been acquired by the state government. In support learned counsel referred to ss 30 and 31 of the Land

A Ordinance. This reliance is again misplaced because the defendant being a private limited company does not fall within the ambit of these provisions. These two provisions are meant for the state government only. More importantly there is no evidence that the land had been acquired by the state government pursuant to s 3(5) of the Land Acquisition Ordinance (Cap 69).
B In fact the defendant's then company secretary and general manager (PW2) testified in para 14 of his witness statement that as far as he knew there was never any acquisition of the requisite portion of the land required for the construction of the access road by the state government. He added that it was a normal sale and purchase of land between the landowners, including the
C plaintiff and the defendant. As mentioned earlier in this judgment PW2's explanation is that when he referred to acquisition he was referring to the sale and purchase agreement and not under the land acquisition rules.

[31] In cross-examination PW2 was asked whether the acquisition would
D come under the first category of acquisition under the Land Ordinance, which is acquisition by negotiation and PW2's answer was that it was not intended to be acquisition by negotiation at that time. The evidence further shows that the plaintiff's title to land remains intact as there is no endorsement of any acquisition on the original document of title.
E

[32] The defendant referred to the existence of the survey plan (D2) as proof that the plaintiff's land had been acquired. However, the defendant's own witness Peter Stanley Mopilin (DW2) who was a district surveyor attached to the Lands and Surveys Department Kota Kinabalu prior to his
F resignation agreed under cross-examination that the fact that a survey had been carried out does not mean that acquisition of land had taken place. The maker of D2 was also not called to give evidence. In the result the contents of D2 were not even proved.

G CONCLUSION

[33] Having regard to the evidence clearly this is a case in which the court should exercise the discretion to grant the reliefs sought. The issues raised by
H the plaintiff are not hypothetical issues, nor are they of no practical consequence. The plaintiff's case is based on actual and continued trespass by the defendant. I am satisfied that the plaintiff has proved her case on the balance of probabilities and accordingly allowed her claim in terms of the statement of claim dated 19 December 2007. Costs to be borne by the

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defendant, to be taxed unless agreed.

Plaintiff's claim allowed.

Reported by Mashrifah Ravendran